No. 10063

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ALBERT G. STANGER AND PHYLLIS STANGER,

Appellees.

BRIEF OF APPELLANT

Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

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OPINION BELOW

The opinion of the district court is not reported but may be found in the record at pages 12-16.

JURISDICTION

This suit was instituted in the Fifth Judicial District Court of the State of Idaho, in and for Bannock County, July 16, 1941 (R. 1-8) by Albert G. Stanger and Phyllis Stanger, his wife, residents of the State of Idaho (R. 70, 136) to recover $50,000.00 damages (R. 6) against the Union Pacific Railroad Company, a corporation of the State of Utah (R. 1), for personal injuries alleged to have been sustained in a train derailment in the State of Colorado, and on August

7, 1941, an order was made by the District Judge for the removal of the case to the United States District Court for the District of Idaho, Eastern Division (R. 11). The jurisdiction of the District Court was based upon Section 24 of the Judicial Code as amended, 28 U. S. C. A. Sec. 41. The case went to trial October 21, 1941, before Hon. Charles C. Cavanah, sitting without a jury, and after the evidence had been received the case was taken under advisement (R. 302) and the court rendered its opinion December 6, 1941, awarding judgment in favor of the plaintiffs in the sum of $19,000.00 (R. 12, 15). Judgment for that amount was entered December 24, 1941, (R. 28-29). Notice of appeal was filed January 31, 1942, (R. 53). The jurisdiction of this court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C., Sec. 225 (a).

QUESTIONS PRESENTED

The questions presented are (1st) whether, under the pleadings and the evidence the defendant was liable, and (2nd) whether the court did not erroneously embrace in his award damages, and elements of damage, for which the defendant was not liable.

STATEMENT

There were two cases brought, one by Albert G. Stanger for injuries he claimed to have been sustained by him, and another by Albert G. Stanger and Phyllis Stanger for injuries claimed to have been sustained by Phyllis Stanger in a train

derailment near Denver, Colorado in January, 1940 (R. 3). These two cases were consolidated for trial and tried under the title in the last mentioned case, No. 1149 (R. 16, 69). The court found against Albert G. Stanger in his case, No. 1148, (R. 22-23) and in favor of the plaintiffs-appellees in case No. 1149 in the sum of $19,000.00 for injuries asserted by Phyllis Stanger (R. 26-29).

Objections to findings of fact and conclusions of law (R. 29-43) and Petition and Motion for new trial based upon insufficiency of the evidence to support certain findings and conclusions, errors of law, and excessive damages (R. 45-51) were filed, argued and submitted. The objections to findings were granted only partially (R. 43-44) and the petition and motion for new trial was, by the court, denied (R. 52). As heretofore stated the defendant has appealed (R. 52-67).

APPELLEES TESTIMONY

The appellees live at Idaho Falls, Idaho, and on the 13th day of January, 1940, left Idaho Falls on one of appellant's trains for Houston, Texas (R. 70-71). The next morning at a point about 30 miles from Denver, Colorado, the car in which plaintiffs were riding was derailed (R. 74). They were riding in a standard sleeping car (R. 120), Mr. Stanger was riding with his back to the front of the train and Mrs. Stanger was directly opposite him facing forward. A regular Pullman table was between them and they were playing cards with two men (R. 75). The train at the time of derailment was traveling about 65 miles per hour (R. 77). After the derailment the car in which they were riding came to rest at an angle

beside the track or in a barrow pit (R. 78). The weather was cold and there was snow on the ground (R. 79). They got out of the Pullman car and went to a parallel highway and obtained a ride into Denver, and at the Pullman car Mrs. Stanger started to flow (R. 80). They met friends at Denver who called a Doctor to give them aid (R. 81). What kind of treatment was given is not shown. Mrs. Stanger claimed the card table struck her in the abdomen (R. 137), but Dr. Hatch said the female organs were low in the body and behind the pelvic and pubic bones (R. 101). In other words they were protected and couldn't have been directly injured by the table which was 10¼ inches above the seat (R. 268). They left Denver that night at about 8 o'clock, going by train to Houston, Texas, where they attended a convention for three days, after which they went to Mexico City where they traveled about for three days sightseeing, and then returned to Idaho Falls January 29th or 30th. Mrs. Stanger went to Dr. Hatch on February 12, 1941 (R. 95, 117, 119, 146-147). While at Denver they had dinner with friends, went to the Horse Show and then had dinner at the Athletic Club, after which they went to board the train for Houston, Texas (R. 146).

Mrs. Stanger testified on direct examination that for three months prior to the trip her condition was better than it had been for a long time and that about three months before she left she had been to a Doctor because her period "which was normally four days had gone into about a seven day period" (R. 143). She said she went to Dr. Wooley for treatment because her periods were running into seven or eight days (R. 147). This was November 10, 1939 (R. 216), and since

the birth of her last child had had excessive flowing or longer than her normal period, which she said was about a week instead of four days (R. 148). The youngest child was two years of age at the time of the trial October 20, 1941 (R. 148), about one year old on February 12, 1940 (R. 102). Dr. Hatch treated her for the uterus bleeding (R. 95) and when she did not respond to treatment he operated on her to remove the bleeding uterus on July 9, 1940 (R. 96). In June she had gone to Fresno, Cal. and return on an automobile trip (R. 157). She did not bleed after the operation (R. 142-143). In the operation he removed the uterus and the womb, the right ovary and did a conization of the cervix and removal of the lining of the neck of the womb (R. 97). The uterus was fibrous and that was removed to stop the bleeding (R. 99). He had a history of her having this bleeding following child birth and prior to January, 1940 (R. 102). She told him she had been to other doctors for similar treatment (R. 103). The ovary removed had multiple follicular cysts (R. 105). The doctor had performed several such operations on women who had never been in a train wreck (R. 116). The pathological reports disclosed a well developed chronic condition of fibrous uterus and chronic cervicitis (R. 100-101).

APPELLANT'S TESTIMONY

This derailment occurred about 37 miles from Denver at a place called Houston, Colorado, on the main line between Omaha, Nebraska and Denver, Colorado. This particular train ran from Cheyenne, Wyoming, to Denver and connected

with the Omaha-Denver main line at LaSalle (R. 179). The train consisted of eight cars, the mail car, two baggage cars, a coach, Pullman tourist, another coach, a Pullman standard and a cafe lounge car (R. 267). The Stangers were riding in the Standard Pullman—next to the last car in the train.

Traveling through Houston the train was moving at 60 or 65 miles per hour (R. 181), which was the normal running time, and nothing unusual was observed or noticeable on the engine as it passed through Houston (R. 182). The engineer was first apprised that something was wrong when the air brakes were applied in emergency due to the train parting. When the train stopped he went back and found that four cars only were attached to the engine and all on the rails, and found a broken wheel on the right rear truck of the fourth or rear car (R. 180-181). Three or four of the rear cars were derailed (R. 183). The wheel was broken in several pieces—only the web of the wheel was on the axle (R. 185).

The road bed consisted of Sherman gravel of eight inches or better under the ties—good treated ties, tie plates and 110 pound rail thirty-nine feet sections laid in 1932 (R. 192). Inspection disclosed that at a point 19 or 20 feet east of the frog and near the center of the switch there was a place about one-half inch, on the top of the rail as if something had been pounded into it. There was nothing west of there, but 16 feet east of the frog the rail was torn out and broken, caused by the broken wheel. Inspection of the track west of the frog disclosed no evidence of anything which had been dragging and no evidence of any defect that could have caused the

wreck (R. 191). This accident occurred on Sunday (R. 189), and on Saturday, the day before the accident, this switch and track were inspected and found to be in perfect condition (R. 192). From the time of this inspection up to the time of the derailment trains had passed over this part of the track. The guage of the track was perfect (R. 196-197). The four cars behind the engine were inspected and nothing found to be missing or defective except a broken wheel on the right rear truck. About 16 inches of the plate of the wheel was left on the axle (R. 266). The breaks of the wheel were all new breaks (R. 267, 263, 289). There was nothing broken inside the Pullman car, and measurements disclosed that there is a free height of 10¼ inches from the top of the seat to the top of the card table. All of the seats and backs were cushioned (R. 268). All the broken parts of the wheel were located, picked up, packed and shipped to Dr. Barr at Omaha (R.263-264), and all of the broken parts fit the part of the plate left on the axle (R. 264). When these parts together with the part of the plate left on the axle were received by Dr. Barr at Omaha a metallurgical test of the wheel was made to determine what caused it to break (R.277). The wheel broke due to internal stresses that developed during the manufacture of the wheel (R. 286). These stresses, or the thing which caused the wheel to break, could not be discovered by any kind of inspection and could not be found "without cutting the wheel up" (R. 288). The thing that caused the wheel to break was in it when it left the mill, it developed during the manufacture (R. 291). This wheel was manufactured in 1928, and there are thousands of the same kind in operation on the Union

Pacific Railroad and also on other railroads, and since 1912 there have been but two wheels break from such causes (R. 289-290). The breaks were all new breaks; nothing was found on the broken parts to cause it to break; the breaks were bright and shiny; the wheel had recently been turned (R. 289), and there had been no friction heat produced which would or could have caused the wheel to break (R. 294). A chemical analysis was also made of the wheel and it was found to conform to all standards (R. 294-296).

Dr. Hoyt B. Wooley had graduated at Illinois Masonic Hospital in 1932, and who had been admitted to practice in the State of Idaho for eight years (R. 216), referred to his office record which was made by him at the time of Mrs. Stanger's visits (R. 236) and testified that the first professional services which he rendered to her was on November 10, 1939 (R. 216). On that date she stated to him that for the past four years she had been flowing from eight to ten days twice a month—large clots, backache, cramps in the groin before menses and during menses, run down most of the time and had been taking iron preparation; her last menstrual period extended from October 28 to November 9th, the last five days much darker than usual; blood count 42% hemoglobin (R. 219). Treatment instituted was intermuscular injection of astrone, with elixir before meals. Her last visit to him prior to January 1, 1940, was December 14, 1939, at which time she told him that she and her husband were leaving on a trip and that when she returned she would be back to see him (R. 220). Did not think she was cured at any time (R. 221). Did not examine her on December 14,

1939 (R. 222). [Mrs. Stanger says he couldn't because of her flowing (R. 149)]. Dr. Wooley inspected the pathological report, defendants' Exhibit 1, (R. 221). The pathological report, which fitted in with the doctor's findings, was made by Dr. Daines of tissue from the uterus, cervical tissue, and analyzed as fibrosis uteri with diffuse endometrial hyperplasia, chronic fibrous cervicitis, multiple follicular cysts of the ovary with corpus hemorrhagicum. The diagnosis of fibrous uteri with diffuse endometrial hyperplasia could be ascribed to the history which Mrs. Stanger gave to Dr. Wooley at the time of his examination (R. 224). Taking into account the pathological diagnosis of the tissue removed at the time of the operation and its analysis together with the examination made by Dr. Wooley and the history which Mrs. Stanger gave him it was his opinion that she was not cured when she last called upon him, December 14, 1939 (R. 225). She did not call at his office or send for him after that date. Speaking of the condition that brings about such disorders as Mrs. Stanger had when she came to him, the Doctor said the condition of the uterus which was fibrous was a condition that occurs over a period of time and is of a chronic nature. Hyperplasia endometrial is a condition in which the lining of the uterus which normally is sloughed off at each menstruation is much thicker than normal, because of the increase in size and thickness, the increase in vascularity causes the flow to be continued and causes, or because of the replacement of muscle tissue by fibrous tissue does not permit the uterus to contract, thus bringing about a continuation of the flowing (R. 226). Chronic fibrous cervicitis is a condition very similar to the fibrous con-

dition you have in the uterus only it exists in the cervix or the mouth of the uterus, it is a condition of the replacement of normal cervical tissue with fibrous tissue, and chronic means a condition lasting over a period of time, months or possibly a year. Assuming a patient who has a flowing condition such as Mrs. Stanger described to Dr. Wooley, with pathological report showing fibrosis uteri and chronic fibrous cervicitis, it was the doctor's opinion that the excessive flowing was caused by the fibrous condition of the uterus and hyperplastic condition of the endometrium (R. 227-228, 243). The surgical remedy is to remove the uterus (R. 226); ultimately to effect a complete cure surgery is necessary (R. 244). With fibrous uteri with hyperplasia endometrium you would have excessive flowing in all cases (R. 233). The examination made by Dr. Wooley on November 10, 1939, was a check up as to her physical condition, excluding a pelvic examination; she had been flowing from the 28th of October until the day before she came to his office (R. 233). When Mrs. Stanger told Dr. Wooley that for the past four years she had flowed eight to ten days twice a month he interpreted that to mean during the period that pregnancy was not present (R. 235). The "shots" which the Doctor gave to Mrs. Stanger had a beneficial effect (R. 237). Patients respond to such treatment for varying periods of time, and then there comes a time when they do not respond to that treatment (R. 238). A rise of hemoglobin from 42% to 68% would be an improvement (R. 239), but Mrs. Stanger was not cured December 14, 1939 (R. 240). Mrs. Stanger did not dispute Dr. Wooley's testimony except to the extent of asserting that on November 10,

1940 (1939), (at the time she was in the office of Dr. Wooley) she did not state to him that her period of flowing had been and was for a period of eight or ten days twice a month or that she had flowed excessively during the past four years (R. 300), but asserted that she went to him for the purpose of "checking the flow" (R. 301).

Dr. W. W. Brothers, a licensed physician and surgeon since November 1919, whose practice consisted mostly of surgery and surgical diseases of women particularly (R. 246), examined Mrs. Stanger at Idaho Falls October 9, 1941, at which time she stated that she first began excessive menstruation following the birth of the last baby two years previously. Dr. Hatch was present at the time of the examination (R. 247). Dr. Brothers read the pathological report of the tissue removed and talked to Dr. Hatch, and that together with the history formed his impression of the condition. His impression was that she had suffered for some time from fibrosis of the uterus, chronic cervicitis, inflammation of the cervix and hyperplasis of the endometrium, that this condition improved somewhat but got worse, but after the operation she was satisfactorily improved. The main symptoms of fibrous uterus, or fibrosis uteri are excessive menstruation followed by anemia, all the symptoms of anemia such as nervousness and weakness; anemia is secondary to loss of blood; she lost too much blood, more than she could replenish (R. 249). Fibrosis uteri and the other conditions referred to may be treated with injections which are not so satisfactory but might give temporary relief, and small doses of radium, which is quite effective, and X-ray treatment and surgery such as was

done in this case (R. 250). Assuming the history given by Mrs. Stanger of excessive menstruation following the birth of her last baby about two years previous to the time of trial, Dr. Brothers attributed the excessive flowing to hyperplasia of the endometrium and fibrosis of the uterus ,and it was his opinion from his examination and the history that he had received that the operation such as Dr. Hatch performed would ultimately be necessary (R. 251). If Mrs. Stanger had been treated by some other treatment by the giving of shots, and had responded and her hemoglobin built up from 42% to 68% over a period of thirty days she could have been relieved but would not expect a cure. Usually find excessive flowing where the uterus has become fibrous (R.252). Excessive flowing by physical violence or injury is not caused unless there is a direct injury to the organ; do not think there could be enough violence or force applied to the outside surface to produce excessive menstruation—not unless there was some pathological condition not in a normal uterus. In a uterus that is not normal it might increase the flow for a time (R. 257), but it would be temporary and should clear up within a few days (R. 258). Assuming severe nervous shock, that might increase the flowing to some extent but that would be temporary (R. 257-258, 259), it would be rather minor. If she went to bed and rested she would probably get over that in a few days (R. 259).

Dr. Miller, who was the family physician and who attended Mrs. Stanger upon the birth of her last child (R. 147) was not called to treat her upon her return to Idaho Falls and was not called as a witness.

In June, 1940, Mr. and Mrs. Stanger drove by automobile from Idaho Falls to Fresno, California, and return, being gone about ten days (R. 157). She was operated on July 9, 1940 (R. 96).

SPECIFICATION OF ERRORS

I.

The evidence is insufficient to support a finding that defendant was guilty of any negligence as charged in the complaint, for the reason that plaintiffs did not offer or introduce any evidence of negligence but relied entirely on an inference of negligence arising from the derailment of the train and defendant's evidence completely rebutted any inference of negligence by establishing without dispute that the track and roadbed were in good condition, that there was no defect in the passenger equipment but that the derailment was caused by a broken wheel resulting from internal stress which was latent and could not have been found or discovered by any kind of inspection prior to the time it broke. (See paragraph I (a) and (b) of petition and motion for new trial (R.45-46).) For all of which reasons the court erred in denying defendant's motion for judgment and in making and entering findings of fact and conclusions of law and judgment in favor of the plaintiffs. (R. 302, 12-16, 16-28).

II.

The court erred in denying defendant's motion for judgment (R. 301-302), in denying defendant's motion to amend findings of fact and conclusions of law (R. 29-43), and in denying defendant's motion for new trial (R. 45-51), for

the reasons set forth in specification I and for reasons set forth in the following specifications, and, in rendering his decision, in proceeding upon the assumption that the burden was on the appellant to establish that the train wreck was not caused by any negligence on its part (R. 14).

III.

The court erred in holding and finding that the plaintiff Phyllis Stanger was in "reasonably good health" prior to the accident, and in basing his award of damages on such assumption, because it was established by the evidence that she had suffered from excessive and prolonged mensturation or flowing ever since the birth of her last child, about ten months previous to the derailment, for the alleviation or cure of which she had been doctoring and was not cured, and that the condition from which she was so suffering was a chronic disorder caused by child birth infection to her uterus and cervix and other organs (R. 21).

IV.

The court erred in holding and finding that the plaintiff Phyllis Stanger was severely and permanently injured internally, and in basing his award of damages on such assumption, because the evidence is insufficient to support such finding, but on the contrary it was established by the evidence that she was suffering from a chronic female disorder prior to and at the time of the derailment in which she claimed to be so injured, for the complete and ultimate cure of which an operation was necessary and would be performed. Furthermore it

was established by the undisputed evidence that whatever nervous shock or menstruation or flowing resulted from or were occasioned at the time of the derailment were neither serious nor permanent nor were they the cause of her subsequent operation (R. 19).

V.

The court erred in holding and finding that the plaintiff Phyllis Stanger would continue to suffer nervously and/or physically in consequence thereof as long as she might live, and in basing his award of damages on such assumption, for the reasons assigned in the preceding assignment of error and because it was established by the evidence without dispute that since the operation which was performed on the said Phyllis Stanger July 9, 1940, she had experienced a speedy and marked recovery both nervously and physically and the evidence is wholly insufficient to support a finding that she will not completely recover both nervously and physically within a brief space of time. (R. 26).

VI.

The court erred in holding and finding that the operation which was performed by Dr. Hatch on Phyllis Stanger in July, 1940, was necessitated by or because of injuries received by her at the time of or in the accident or derailment and in basing his award of damages on such finding and assumption without regard to her chronic ailment or disorder for the reasons specified in the two preceding assignments of error (R. 20, 21).

VII.

The court erred in holding and finding that excessive flowing caused by the derailment necessitated an operation which made Phyllis Stanger sterile, and in holding and finding that the "nervous shock and all of the personal injuries suffered and received by said Phyllis Stanger in said accident were due and proximately caused by the negligence and carelessness of the defendant, its agents, servants and employees," and in assessing or awarding damages on that basis for the reasons assigned in specification of errors III and IV herein preceding (R. 22).

VIII.

The court erred in holding and finding that the uterus of Phyllis Stanger was removed because of the injuries received by her at the time of the accident or derailment and that she was caused to become sterile through the fault or negligence of the defendant and in assessing or awarding damages for the removal of said uterus and for sterility and for nervous and other injuries which he erroneously found to be permanent without taking into account or making allowance for the chronic ailment or disorder with which she was afflicted, for the reasons assigned in specifications of error III and IV herein preceding (R. 22).

IX.

The court erred in refusing to strike paragraph VII of its findings of fact (R. 20) and substitute in lieu thereof the findings set forth in paragraph III of defendant's objections

to findings and motion to amend the same (R. 30), because it is not true and the evidence is not sufficient to support a finding that at the time the surgical operation was performed upon Phyllis Stanger her uterus was removed "because of the said injuries received at the time of the accident" and the resultant excessive flowing and the removal of her uterus thereby making her sterile, and for the reasons assigned in the defendant's aforesaid specification of error III (R. 30-34).

X.

Mrs. Stanger was suffering from chronic cervicitis and a fibrous uterus, the result of previous child birth and infection, for the cure of which an operation was necessary and was performed which caused her to be sterile, and the defendant was not and is not liable therefor, and the court erred in failing, in rendering judgment, to take into account that said Phyllis Stanger had an established or chronic condition or disorder of her uterus and other related organs, which was the basic cause of her operation, and which it was necessary to operate upon to cure, and that the defendant could not lawfully be charged therewith, but for the consequences of which the court erronsously awarded and assessed damages against the defendant, without making allowance for said chronic or preexisting condition, as is more fully set forth in paragraph I (c) of the defendant's motion for new trial (R. 46-47, 48), and for the same reasons erred in denying said motion for new trial.

XI.

For the reasons stated in paragraph X hereof, the judg-

ment is excessive and the evidence is insufficient to justify the decision and it is against law (R. 45-48, 52).

ARGUMENT

I.

Under this point will be discussed the negligence phase of the case. It is our contention that the court erred (1) in failing to grant appellant's motion for judgment, (R. 301-302); (2) in failing to grant appellant's motion to amend findings and conclusions of law, (R. 29-43), and (3) in failing to grant appellant's petition and motion for new trial (R. 45-51). The facts and the law will be discussed (Errors I and II).

Appellant conclusively rebutted any inference of negligence arising from the fact of derailment.

The issue concerning negligence was made by appellees in paragraph V of their complaint. It is that "by reason of the defective equipment, roadbed, and tracks, said train derailed and left the tracks." (R. 3)

The track and roadbed were in perfect condition, it having been properly maintained, and inspected the day before the derailment (R. 192). The engine of this train and four cars were not derailed (R. 181), and trains passed over this track subsequent to the section foreman's inspection on Saturday and up to the time the derailment occurred (R. 196). Leaving for consideration only whether there was any negligence on the part of the appellant with reference to the equipment. As

a matter of fact the court found that Mrs. Stanger suffered injuries as a result of the carelessness and negligence of the defendant, its servants, agents and employees "in failing in their duty of inspection of the passenger cars and equipment prior to the time the said accident occurred" (Finding IX R. 22). It was then found by way of argument in Finding XIII (R. 25) that defendant's evidence failed to rebut the inference of negligence with reference to the "inspecting, maintaining, managing and operation of its passenger equipment." *Findings IX and XIII are not supported by the facts in the record.*

The train was being operated at the usual and customary speed. The usual station stops were made between Cheyenne and the point of derailment, and nothing unusual was noticeable as the engine went over the track where the rear of the train derailed (R. 182). As pointing to the fact that the broken wheel caused the derailment it is significant to note that the four rear cars were derailed and the four head cars and engine were not (R. 180-181, 266). Also, that about 19 or 20 feet east of the frog of the east switch at Houston there was a flat place or nick in the top of the rail, as if something had been pounded into the top of the rail, and then about 16 feet further east the rail began to break. The section foreman concluded the rails broke because of the broken wheel (R. 191). That is the only conclusion that can be reached. The track and roadbed were in perfect condition. The frog was not damaged and is still in service (R. 196). Further, with reference to the equipment, Mr. Schroder, the general car foreman, inspected the four cars behind the engine and found no parts of any

of these cars missing, and found no parts along the track. The only thing he found which was not normal, was the broken wheel on the right rear truck of the fourth car behind the engine (R. 266-267); all derailed cars derailed to the right (R. 194). This brings us then to the broken wheel—the only cause of the derailment. The next inquiry then is, (1) why did the wheel break, and (2) could the thing which caused it to break have been discovered by any kind of inspection?

(1) "This wheel broke due to internal stress that are locked up in the plate that develop during the manufacture." To determine this the wheel was cut or sawed through the hub and through the plate. "In the construction of the wheel the outside portion is a heavy mass and the hub is a heavy mass, the plate is thin and unless it is control cooled these stresses set up, and they were there" (R. 286). The wheel broke suddenly. This is definitely established by the fact that all the broken parts were bright and shiny and all were new breaks. Breakage from internal stress is very rare. There have been but two breaks in the past thirty years, notwithstanding the fact that there are thousands of this same type of wheel in use on appellant's line, and all over the country. The same type of wheel is used by other railroads, made by the same mill and the same specifications (R. 289-290). All railroads purchase wheels under the A. R. A. (American Railway Association) specifications (R. 286-287), and this wheel met the specifications (R. 294-296).

(2) As to whether the stresses that caused the wheel to break could be found or discovered by any observation or

inspection, the witness said: "No way to find them without cutting the wheel up" (R. 288).

Appellees merely offered testimony showing the derailment and then made an attempt to show injuries as a result of the derailment. The court found Mr. Stanger was not injured, but that Mrs. Stanger was. So far as the negligence phase is concerned appellees offered no evidence and the testimony in that regard given by appellant's witnesses stands undisputed, and was not shaken or discredited in any manner by cross-examination.

Every inference of negligence that can possibly be drawn from the fact of the derailment, was thoroughly and conclusively rebutted. The only issue relates to the equipment and, as the evidence shows, all of the equipment which could have caused the derailment was found to be intact, except for the broken rear wheel on the rear car (R. 266), and nothing was found along the track either east or west of the frog or switch that could have caused the derailment (R. 190). When a portion of the wheel was cut out the etching established a clean, dense structure, showing no defects in the plate area (R. 277-278).

Under the facts in this case there was no negligence.

Appellant's duty under the law is well stated in Hutchinson on Carriers, 3rd Ed. Sec. 903, 904, p. 1010 as follows:

> "Where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose and which could not be guarded

> against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense."

In 3 Cooley on Torts, (4th Ed.) Sec. 480, p. 375, the author says:

> "Thus there is a presumption of negligence when a passenger is injured by the derailing of his train, or by a collision or other accident to the car in which he is riding. *But this rule of evidence is not conclusive. The carrier may rebut the presumption and relieve himself from responsibility by showing that the injury arose from an accident which the utmost skill, foresight, and diligence could not prevent.*" (Italics ours)

There is no case which sets the duty of care on the part of the appellant higher than "human foresight."

> Gleeson vs. Va. Midland Ry. Co., 140 U. S. 435, 443, 35 L. Ed. 458,

and

> "* * * if the cause of the injury was one which it could not have foreseen and guarded against, it was not culpable."
>
> San Juan Light T. Co., vs. Requena, 224 U. S. 89, 98, 56 L. Ed. 680.

The court in the last case, in discussing the doctrine of res ipsa loquitur, said:

> "* * * when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in *the absence of an explanation*, that the injury arose from the defendant's want of care." (Italics ours)

The appellant is not an insurer of the safety of passengers, it is liable only for negligence.

> Kitsap County Transportation Co., vs. Harney, (9th Cir.) 15 Fed. (2d) 166;
>
> Waller vs. Southern Pacific Co., (D. C. Cal.) 37 Fed. Supp. 475;
>
> Boucher vs. Boston & M. R. Co. (N. H.) 79 Atl. 993;
>
> Hines vs. Beard (Va.) 107 S. E. 717.

But the decision of the court in this case and the findings made, imposed a duty on appellant far beyond which any court has ever gone. Even though the internal stress in the wheel, which caused it to give way and break, could not have been discovered by any human skill or foresight, the court held that appellant was negligent for failing to discover this by prior inspection. The only evidence on the matter is that it could only be discovered by sawing or cutting the wheel as the witness Pflasterer did after the accident. To comply with the rule applied by the trial court would require railroad companies to saw or cut up every wheel it purchased before it put them into service. That is the only method by which the thing

that caused the wheel to break could be found. To comply with such a rule would be nothing short of imposing on carriers absolute insurance of safety, which, of course, is not the law.

The trial court in his opinion stated that the law required appellant to "exercise the utmost care and diligence or the highest degree of care and prudence and foresight for the passengers' safety," yet in the face of all of the uncontradicted and unimpeached testimony held that appellant had not done that (R. 13).

Not only that, but the court seemed to labor under the impression that it was the duty of appellant to carry the burden of proving that it was not negligent, for the court said:

> "This duty was upon the defendant when it accepted passengers and when we apply the doctrine of res ipsa loquitur it was upon the defendant to explain, *which it did not,* as stated, *that the train wreck was not caused by any negligence on its part.*" (R. 14) (italics ours)

Under the doctrine of res ipsa loquitur the plaintiff is not relieved of the burden of proof, and all the defendant is called upon to do is to produce exculpating evidence of equal weight and in such cases the plaintiff fails if the force of the maxim is counterbalanced by the facts disclosed.

> Scellars vs. Universal Service Everywhere, (Cal.) 228 Pac. 879;
>
> Humphrey vs. Twin States Gas & Elec. Co., (Vt.) 139 Atl. 440, 56 A. L. R. 1011;

Briglio vs. Holt and Jeffery (Wash.) 147 Pac. 877.

The same rule of law has been recognized and established by the United States Supreme Court in Sweeney vs. Erving, 228 U. S. 233, 240, 241, 57 L. Ed. 815. In that case the court said:

> "In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the *inference of negligence, not that they compel such an inference.*" (italics ours)

The court in the above case, in quoting with approval from a New York decision, said:

> "* * * but when the proof was all in, the burden of proof had not shifted, but was still upon the plaintiff * * *. If the defendant's proof operated to rebut the presumption upon which the plaintiff relied, *or if it left the essential fact of negligence in doubt and uncertainty, the party who made that allegation should suffer, and not her adversary.* * * *" (italics ours)

The only thing the appellees can claim for the doctrine of res ipsa loquitur is that the fact of accident raises an inference of negligence. This inference, of course, is a rebuttable one, and the burden remained throughout the trial upon the appellees to establish negligence by a preponderance of the evidence, and the appellant having explained the cause of the accident and rebutted every inference of negligence, appellees case failed because there was no evidence of negligence. The situation is the same as that which arose in the case of Pennsylvania R. Co., vs. Chamberlain, 288 U. S. 333, 77 L. Ed. 819, wherein the court said:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, *and this is not permissible in the face of positive and other uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the facts sought to be inferred did not exist.*" (italics ours)

The court cites a great number of authorities to support this statement and specifically refers to the 8th Circuit Court case of Wabash R. Co., vs. DeTar, 141 Fed. 932, and says that a rebuttable inference of fact

> "must necessarily yield to credible evidence of the actual occurrence."

The court also approved a statement by the Missouri Court as follows:

> "It is well settled that where plaintiff's case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inference."

In the Chamberlain case the court reaffirms the statement that the scintilla rule has been definitely and repeatedly rejected so far as the Federal Courts are concerned, and also lays down the well known rule for directing verdicts.

In a recent decision of the United States Supreme Court it was held that a plaintiff had not carried the burden of proof of establishing that a vessel was unseaworthy. *Commercial*

Molasses Corp., vs. New York T. B. Corp., 86 L. Ed. 125 (adv. op.). The court said:

> "This is but a particular application of the doctrine of res ipsa loquitur, which similarly is an aid to the plaintiff in sustaining the burden of proving breach of the duty of due care *but does not avoid the requirement that upon the whole case he must prove the breach by the preponderance of evidence.* Sweeney vs. Erving, 228 U. S. 233, 57 L. Ed. 815, 33 S. Ct. 416, Ann. Cas. 1914 D. 905." (italics ours)

It was not necessary to entitle appellant to a judgment that the cause of the derailment be established beyond reasonable doubt. If appellant's evidence raised only an equipoise, that was sufficient and it was entitled to judgment as a matter of law.

New York Cent. R. Co., vs. Johnson (8 Cir.) 27 Fed. (2d) 699;

Chesapeake & O. Ry. Co., vs. Baker, (Ga.) 143 S. E. 299;

McClaskey vs. Koplar (Mo.) 46 S. W. (2d) 557, 92 A. L. R. 641, 650;

Omaha Street R. Co., vs. Boesen (Neb.) 105 N.W. 303, 4 L. R. A. (NS) 122, 129;

Hughes vs. Atlantic City S. R. Co., (N.J.) 89 Atl. 769, LRA 1916 A.-927;

Bollinbach vs. Bloomenthal (Ill.) 173 N. E. 670.

The trial court could not ignore appellant's testimony.

The court could not legally ignore appellant's testimony, but this the court did, otherwise appellant would have had judgment. There was nothing in the testimony of any of appellant's witnesses which was not credible. There was "no lack of candor" on their part and "it was not shaken by cross examination. * * Its accuracy was not controverted by proof of circumstances," and "there is nothing in the record which reflects unfavorably upon his (their) credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of opinion that this was not enough to take the question to the jury and the court should have so held."

Chesapeake & O. R. Co., vs. Martin, 283 U. S. 209, 216.
See also:

Penna. R. Co., vs. Chamberlain, 288 U. S. 333, 339;

Edward vs. W. U. Tel. Co., 45 N. Y. 553, 6 Am. Rep. 140.

To hold in favor of appellees the court had to ignore Pflasterer's testimony, when in testifying about finding the stress which caused the wheel to break, he said "no way to find them without cutting the wheel up" (R. 288).

> "* * * their's being the only testimony on the point, disbelief of the testimony cannot supply a want of proof."

Bunt vs. Sierra Butte Gold Min. Co., 138 U. S. 483.

It is only when the facts ~~are~~ or the reasonable inferences to be drawn from them are in dispute that a question is made for the jury in a res ipsa loquitur case.

The foregoing statement is fully supported by the authorities.

Dierks Lumber & Coal Co., vs. Brown (8 Cir.) 19 F. (2d) 732, 737;

St. L. & S. F. R. Co., vs. Gleaves (5 Cir.) 294 Fed. 523;

Holland vs. Dir. Gen., (3 Cir.) 273 Fed. 928;

Woodward vs. C. M. St. P. R. Co., 145 Fed. 577;

Gray vs. B. & O. RR Co., (7 Cir.) 24 Fed. (2d) 671;

Glassmeyer vs. Penn. RR (N.J.) 167 Atl. 750;

Central of Georgia Ry. Co., vs. Holmes (Ga.) 34 S. E. 846.

These cases are also authority for the statement that whether a case should be submitted to the jury is one to be determined upon the facts of each case whether a res ipsa loquitur case or otherwise.

The mere fact that the doctrine of res ipsa loquitur applies doesn't compel judgment in favor of the plaintiff on the basis

of negligence, for the rule is merely invoked in law to reach a conclusion of negligence in the absence of evidence to the contrary by the defendant. If the defendant offers credible evidence to the contrary then the inference of negligence disappears and unless the plaintiff produces other evidence independent of the inference or presumption his case fails for want of proof. The burden always remains on him to establish negligence on the part of the defendant by preponderance of the evidence.

It is our opinion that if this case had been tried to a jury that the law as applied to the facts, would have compelled a directed verdict in appellant's favor. The *unexplained* fact of derailment no doubt would have made a jury issue, but where the cause of the derailment was fully explained and the cause shown to have been one that did not result from appellant's negligence, appellant was, as a matter of law entitled to judgment in its favor.

Gray vs. Baltimore & O. R. Co., supra;

Dierks Lumber & Coal Co., vs. Brown, supra;

Holland vs. Director General, supra;

Penna. R. Co., vs. Buckley (3rd Cir.) 210 Fed. 268;

Waller vs. Southern Pac. Co., (D. C. Cal.) 37 F. Supp. 475;

St. L. & S. F. R. Co., vs. Gleaves, supra;

Woodward vs. C. M. St. P. R. Co., supra;

Glassmeyer vs. Penna. R. Co., supra;

Central of Georgia R. Co., vs. Robertson, (Ala.) 83 So. 102;

Virginia Electric Power Co., vs. Lowry (Va.) 184 S. E. 177;

Hines vs. Beard (Va.) 107 S. E. 717;

Chesapeake & O. Ry. Co., vs. Baker (Va.) 143 S E. 299;

Hudson vs. Fort Worth & D. C. Ry. Co., (Tex.) 139 S. W. 617;

Roanoke R. & E. Co., vs. Sterrett (Va.) 62 S. E. 385, 19 LRA (NS) 316;

Memphis Street Railway Co., vs. Stockton (Tenn.) 226 S. W. 187, 22 A. L. R. 1467.

In Holland vs. Director General of Railroads, supra, a passenger sued for injuries sustained in a derailment, relying on the rule of res ipsa loquitur. A verdict was directed for the defendant and affirmed on appeal. The cause of the derailment was a broken rail which contained an internal transverse fissure and which was concealed "and could not have been detected by the naked eye and that no other test than the actual breaking of the rail would have revealed this defect." On the evidence in the case the court said:

> "It has been held by the Court of Errors and Appeals of New Jersey, and also by this court, that a defendant is not liable for injuries resulting from a latent defect of which it was ignorant and which could not be discovered by reasonable care and diligence."

The case of Central of Georgia R. Co., vs. Robertson, supra, is another case where the plaintiff was injured when a coach overturned due to a broken rail, the defect in the rail being a transverse fissure. This defect could not be discovered by any known test and the court reversed a judgment for the plaintiff stating that an affirmative charge in favor of the defendant should have been given by the court. In discussing the evidence the court said:

> "In other words, did it show that the accident was an inevitable one or such that the highest degree of care and foresight could not have prevented or provided against? If so, it was not liable as a matter of law * * *. Here there is no conflict in the evidence; no evidence of a defect except a latent one, which all of the evidence shows could not be discovered by all known tests. * * *
>
> "The evidence shows without conflict and to a reasonable certainty, that the wreck of the train which injured plaintiff was due to a latent defect known as 'transverse fissure,' and that science and art have discovered no means of detecting it."

In Virginia Electric Power Co., vs. Lowry, supra, the derailment was caused by a fracture in the axle of the wheel just inside the hub, which could not have been detected without removing the wheel. The court stated that the rule of res ipsa loquitur does not have the effect of shifting the burden of proof and does not convert the railroad's general issue into an affirmative defense but places the burden upon the plaintiff of establishing negligence. The defect referred to in the case could not have been discovered by any practical method of

inspection and in ordering judgment for the defendant the court said:

> "In the case under consideration ,the cause of the derailment was clearly established. It is a matter of common knowledge that occasionally there is a defect in metal or in machinery which causes it to break regardless of the care used to manufacture, select and maintain such machinery."

In Glassmeyer vs. Penna. R. Co., supra, the trial court directed a verdict for the defendant and the plaintiff appealed. The derailment which caused alleged injuries to the plaintiff resulted from a defect in a brake gear of a car, which defect could not have been found except by dismantling it in the shop. The court said:

> "The carrier, therefore, demonstrated by uncontradicted proof that the injury occurred without negligence on its part. * * * a carrier is not liable for an injury due to a latent defect not discoverable by the exercise of reasonable care. * * * The defendant, by uncontradicted proofs, having rebutted the presumption of negligence, the direction of a verdict in its favor was proper."

In Chesapeake & O. Ry. Co., vs. Baker, supra, the court held the Railroad Company was not liable for injuries to a plaintiff who was a passenger on one of defendant's trains when the train was derailed because a rail broke as the result of a transverse fissure. The court discussed the question of burden of proof and held that a mere equipoise would not entitle the plaintiff to a verdict. The court said:

> "The only reasonable hypothoses to be gathered from evidence, as to the immediate cause of the accident, is that it arose from a defect in a rail not reasonably discoverable."

In Roanoke R. & E. Co., vs. Sterrett, supra, the court held that the defendant was not negligent where a bridge fell because of a defect in a cord which had an imperfect weld and could not have been detected by the utmost scrutiny. The court said:

> "Applying these well settled principles to the established facts in the case before us, the conclusion cannot be escaped that the accident under consideration was one of those inevitable and unavoidable casualties which human care and foresight could not have provided against."

The case of Memphis Street Railway Co., vs. Stockton, supra, is also a case in point and in that case the court held that the Railroad Company was not responsible for the failure of an air brake to work where the defect therein was unknown.

In principle the case at bar cannot be distinguished from the decision of Judge St. Sure in Waller vs. Southern Pacific Co., supra, which involved the derailment of a stream line train in Nevada on August 12, 1939, in which the court held that the plaintiffs were not entitled to judgment because they had not sustained the burden of proof.

There can be no difference in the principle to be applied in the case at bar than that which was applied in the foregoing cases. The transverse fissure which caused the rails to break in the cases cited constitutes a complete parallel to the facts in

the case at bar where the wheel broke from internal stress, which stress could not be found or discovered excpt by sawing or cutting the wheel as the witness Pflasterer did after the accident occurred.

The fact that the doctrine of res ipsa loquitur may be applicable does not change the rules laid down by the United States Supreme Court in A. B. Small Co., vs. Lamborn, 267 U. S. 245, where the court said:

> "The rule for testing the direction of a verdict, as often has been held, is that where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for the other party."

See also:

Gray vs. Baltimore & O. R. Co., supra.

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule, 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'
>
> "Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury."

Gunning vs. Cooley, 281 U. S. 90, 94.

The effect of presumptions is well discussed and considered by this court in the case of Ariasi vs. Orient Insurance Company, (9 Cir.) 50 Fed. (2d) 548. The question in that case was whether or not the appellant's testimony rebutted the presumption that liquor was illegally possessed by the plaintiff arising solely from the revocation of a permit. The appellant testified that his winery was some two hundred feet away from the kitchen of his residence, where it was claimed that he had made an illegal sale of wine; that the wine had been kept in the house and had been kept separate from wine in the winery ever since the prohibition law went into effect; that it was kept in his house for his own personal use and was not wine that he had made himself but had bought it from other people before prohibition, together with some other testimony which was undisputed. The court reversed a judgment for the defendant and held that the court could not arbitrarily reject the testimony of a witness whose testimony appeared credible. The court further held that

> "* * * in the absence of any evidence to the contrary the prima facie effect of the revocation is dissipated by positive evidence to the contrary. It does not constitute evidence to be placed in the scale, and weighed as against the positive evidence of the plaintiff to the effect that he did not intend to violate the law and had not done so."

The court cites one United States Supreme Court case, to-wit: Western & A. R. Company vs. Henderson, 279 U. S. 639, 73 L. Ed. 884, which case we will refer to later, but in addition to that the court quotes from a great number of authorities to the

effect that a presumption disappears when the party against whom it operates produces contrary evidence. One of the authorities referred to states: "Presumptions are bats of the law, flitting in the twilight but disappearing in the sunlight of actual facts."

In Western & A. R. Company vs. Henderson, supra, the Supreme Court of the United States struck down a statute of the State of Georgia which raised a presumption against railroad companies and their employees in the operation of locomotives and trains of cars, and held that the presumption of negligence arose as to each of the particulars specified in the petition and the burden then shifted to the defendant company "to show that its employees exercised ordinary care and diligence in such particulars." The court stated that the effect of the statute was to raise a presumption that the defendant was negligent upon the mere fact of the collision. The appellee insisted that the presumption being established by statute had the effect of evidence and that it was for the jury to decide whether the company's evidence was sufficient to overcome the presumption and that it should not as a matter of law be dissipated when testimony is taken against it. The court said:

> "Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

Appellee in that case relied upon the case of Mobile J. & K. C. R. Company vs. Turnipseed, 219 U. S. 34, 55 L. Ed. 78 which the court stated was a different statute and which merely created prima facie evidence of want of reasonable

skill and care on the part of the railroad company and its servants. Quoting from the Turnipseed case the court said:

> "The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary."

and stated that the statute in the Turnipseed case created merely a temporary inference of fact that vanished upon the introduction of opposing evidence, and for that reason the statute was sustained, but as to the Georgia Statute in the Henderson case, the court stated that it created "an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate," and accordingly held that the statute violated that due process clause of the Fourteenth Amendment.

The doctrine of res ipsa loquitur applied to the case at bar creates only an inference of negligence which is rebuttable and results in a situation the same as the statute in the Turnipseed case, which the court held created merely an inference of fact that vanished on the introduction of opposing evidence.

See also: Woodward vs. C. M. St. P. R. Co., (8 Cir.) 145 Fed. 577, where the court held in a railroad fire case that the statutory presumption of negligence was overcome as a matter of law by defendants evidence showing that the locomotive was operated with due care, and that reasonable care had been exercised to avoid defects in the locomotive.

In Murray vs. Pawtuxet Valley St. Ry. Co., (R. I.) 55 Atl. 491, the court in affirming a judgment for the defendant

in a passenger case where the doctrine of res ipsa loquitur was applicable, said:

> "It is the general rule that where unimpeached witnesses testify distinctly and positively to facts which are uncontradicted, their testimony suffices to overcome a mere presumption."

We respectfully submit that there was no evidence of negligence established by the appellees. Any aid they had by reason of the inference arising from the derailment was completely overcome by appellant's proof. The equipment was thoroughly inspected after the accident and nothing was missing, except portions of the broken wheel on the rear right side of the fourth car behind the engine (R. 266-267); nothing was found on the roadbed either east or west of the point of derailment that had fallen from the train or that could have caused the derailment (R.190). The cause of the derailment, therefore, is definitely placed on the broken wheel which broke from internal stress, which no human foresight could have guarded against, and which could only be found by sawing or cutting the wheel (R. 288). Appellees offered no evidence whatever of negligence. Their prima facie case being completely rebutted, or most certainly equally balanced, appellant was and is entitled to judgment in its favor as a matter of law, and the trial court accordingly erred.

II.

Mrs. Stanger was suffering from chronic cervicitis and a fibrous uterus, the result of previous childbirth infection, for the cure of which an operation was necessary and was performed, and the Railroad Company was not liable therefor, but was held in damages for all ills accruing to her since her last childbirth.

(Errors III to XI incl., pp. 8-12, 14-17 supra)

Since all of the errors embraced within the foregoing assignments are related, we shall discuss them together to avoid repetition of the record.

Albert G. Stanger and Phyllis Stanger, his wife, instituted two suits against the defendant to recover damages for allegedly negligently injuring them in a derailment that occurred about thirty miles north of Denver, Colorado, on January 14, 1940.

A brief reference to the husband's suit seems appropriate, because each complained of the same symptoms concerning nervous condition, and each undertook to corroborate the other on that point (R. 82-83, 143-144), and the judge, who tried the case without a jury, completely rejected Stanger's testimony and denied him a recovery, and by the same token he must have disbelieved Mrs. Stanger insofar as she testified with respect to her husband's alleged physical and nervous injuries (R. 82-83, 14, 22).

The right to damages for personal injuries sustained by a married woman is community property.

Labonte vs. Davidson, 31 Ida. 644, 175 Pac. 588.

Mr. Stanger's testimony concerning injury to and pain in his back and the prolonged treatments that he received appear at pp. 82-86 of the record. Mrs. Stanger's corroboration appears at pp. 143-144. He testified that he had treatment in Texas, employed four doctors in Idaho and had spent from five to seven days at Mayo Brothers Hospital (R. 84, 127). He did not call any doctor of any sort and left the implication that he had been at Mayo Brothers for personal treatment, but on cross-examination it developed that the only reason he was there was to accompany his father (R. 127). The following summer he won the golf championship at Sun Valley (R.124) notwithstanding the fact that in playing golf he had to take milk along to stimulate and sustain him (R. 128) and lie down occasionally on the course (R. 128). On January 2, 1941 he wrote a letter to Mr. Jeffers, President of the Union Pacific Railroad Company, calling attention to the fact that he was a big shipper and threatening business reprisals unless Mr. Jeffers should yield to his demands regardless of the merits (R. 132-135). The Judge denied Stanger recovery on the ground that "the evidence disclosed that he did not receive any injury" (R. 14). He did not appeal.

Mrs. Stanger testified on direct examination that her physical condition for three months previous to the accident, in January 1940, "had been perfect. I was in better condition than I had been for a long time" (R. 143). But she had gone to Dr. Wooley on November 10, 1939 (R. 216) two months previous to the accident, to treat her for abnormal flowing

from which she had suffered since the birth of her last child in February (R. 102, 103) and was last there December 14, 1939 (R. 220) and it was then agreed that she should return to him for further treatment when she should get back from her trip, but she never did (R. 220). She said Dr. Wooley had never made a physical examination of her because of her flowing (R. 149). From her direct testimony the inference would be that she merely "rested for a while at Denver and they took us to the train to go to Houston" (R. 139).

Upon arrival at Denver Mrs. Stanger went first to the home of some friends, where she had dinner, then to the Horse Show that afternoon, and to dinner again at the Denver Athletic Club after the Horse Show (R. 146), and then to the train and on her way to Houston, Texas, arriving Tuesday morning and leaving Friday, and thence to Mexico City, where she and her husband spent from Sunday to Wednesday sightseeing (R. 146); thence home by way of Los Angeles. Following her arrival at Idaho Falls January 29th or 30th she says she went to bed but did not call any physician until on February 12th she went to Dr. Hatch (R. 141), who operated on her July 9, 1940, completely curing the condition of excessive bleeding of the uterus (R. 142-143) from which she had suffered ever since the birth of her last child, which she testified was two years old at the time of the trial on October 20, 1941 (R. 148) but which, according to the hospital record, Exhibit 1, was born in March 1939.

Two men by the names of Bush and Hurst were riding with the Stangers at the time of the derailment (R. 145) but neither of them were called by the plaintiffs as witnesses.

No friend nor acquaintance nor relative from Idaho Falls was called to corroborate Mrs. Stanger concerning her condition from January 29th or 30th until February 12th, or thereafter. She did not call as witnesses either Dr. Miller, her family physician, who attended the birth of her last child (R. 147), nor Dr. Woolley who had been treating her and whose service she had arranged to further employ (R. 220). Her testimony given in rebuttal to Dr. Woolley and Dr. Brothers left numerous damaging points undisputed, and insofar as she did dispute them, the hospital record made by or at the direction of her own physicians (R. 108-110), definitely resolved the issues in support of the doctors, Exhibit 1, which is as follows:

> "Case History 7/8/40. Provisional Diagnosis — Fibrosis uteri. * * * Menstruation started with 14, regular till delivery March 1939, finished menstruating last week. Since this time she has been flowing instead of 4 days *always 3 weeks*, quite *heavy flow*."

It is noteworthy that this case history contains no reference to any mishap while traveling on the railroad.

As it seems quite obvious that the lower court misconceived the law of the case we present that at this point before further discussion of the history of the case and medical testimony.

In Union Oil Company of California vs. Hunt, 111 Fed. (2d) 269, the 9th Circuit Court of Appeals on April 24, 1940, established the law for this circuit in a decision which, after a review of the authorities and decisions at large, includ-

ing a review of the law as announced by the Idaho Supreme Court, said at p. 277:

> "If the facts of aggravation of injury are proved, 'The wrong-doer must answer for any aggravation of the plaintiff's condition for which he is responsible, and that is the limit of his liability.' Sutherland on Damages, vol. 4, Sec. 1244, p. 4676. The recovery, however, must not include damages for injuries which result from the original injury, but must be confined to damages for aggravation of that condition or injury. Jones vs. Caldwell, 20 Idaho 5, 116 P. 110, 48 L. R. A., N. S. 119, 121. It follows, then, that the plaintiff cannot recover in this action for any injuries received prior to November 5, 1934. Maynard vs. Oregon Railroad Co., 46 Or. 15, 22, 78 P. 983, 68 L. R. A. 477. The difficulty with the situation presented here lies in the fact that much of the evidence of pain and suffering and other damages applied only to the first injury, for which any right to recover was altogether abandoned during the trial—at just what stage of the proceeding is not apparent. So we have the anomaly of an award of damages for a second injury based upon improperly admitted evidence concerning a prior injury. Evidence of the first injury and damage thereunder is irrelevant for any purpose, other than to show aggravation. * * * This does not preclude, however, the reception in evidence of testimony of the plaintiff's condition immediately preceding the second injury, which would be admissable for the purpose of showing a base or standard for measuring the damages suffered by the plaintiff in the said second injury.
>
> "It is said in the article on 'Damages,' in American Jurisprudence:
>
> " 'The damages recoverable in any case must be susceptible of ascertainment with a reasonable degree

of certainty, or, as the rule is sometimes stated, must be certain both in their nature and in respect of the cause from which they proceed.' 15 Am. Jur. Sec. 20, p. 410.

" 'The damages recovered in any case must be shown with reasonable certainty both as to their nature and in respect of the cause from which they proceed. No recovery can be had where it is uncertain whether the plaintiff suffered any damages unless it is established with reasonable certainty that the damages sought resulted from the act complained of. Hence, no recovery can be had where resort must be had to speculation on conjecture for the purpose of determining whether the damages resulted from the act of which complaint is made or from some other cause. * * *'. 15 Am. Jur. Sec. 22, p. 413."

In the light of the foregoing decision, which is the considered opinion of this Court, it would seem to be a needless task to attempt to demonstrate the correctness of such decision. However the rule as above announced is in harmony with the general statement of the law by Sutherland on Damages, quoted in the opinion, and text writers generally. Further text and authorities in point are as follows:

15 Am. Jur. 488, Sec. 80, Title "Damages";

17 Cor. Juris 740, Damages, Subtitle "Disease"; 25 C. J. S. 480, Note 18;

Baldwin vs. Peoples Railway (Del.) 76 Atl. 1088;

Braunstein vs. Peoples Railway (Del.) 78 Atl. 609;

St. L. S. W. Ry Co., vs. Johnson (Tex. Sup. Ct.) 97 S. W. 1039, *1042;*

Whitcomb vs. N. W. N. H. & H. R. Co., (Mass.) 102 N. E. 663.

In Pomeroy vs. B. & A. R. Co., (Me.) 67 Atl. 561, the court held:

> "Damages reduced by the court upon the ground that the jury failed to take into consideration the fact that before the accident the plaintiff had been suffering from a complication of physical troubles which account partially, at least, for her present condition."

In Guldner vs. Cramm, 112 Pac. 623, the syllabus by the Kansas Supreme Court is as follows:

> "A man and his wife were traveling upon the public highway in a top buggy, and were negligently struck by a passing automobile. The wife was injured. She at the time was and had been suffering with abdominal fibroid tumors. She was, in about 10 days after the collision with the automobile, operated upon for the removal of said tumors, and died from the effect of the shock produced by such operation. The husband commenced this action to recover damages from the owner of the automobile for the loss of the services of his wife and expenses incurred on account of the injuries received by her from the automobile. Held, that no damages could be recovered in such action on account of the operation." (The recovery was $225).

In Frick, et al., vs. Washington Water Power Company, 130 Pac. 98, it was held by the Washington Supreme Court:

> "Where, in an action against a carrier for injuries to a passenger, she alleged that prior to the injury she

> was an able-bodied woman in good health, but that, by reason of the injury sustained, she acquired appendicitis, retroversion of the womb, and certain other injuries requiring a surgical operation, from which she never fully recovered, but there was evidence that she suffered from a diseased appendix and had retroversion prior to the injury, she was not entitled to recover damages under her complaint for an aggravation or an acceleration of a diseased condition previously existing, unless it appeared that she had no knowledge thereof prior to the accident."

at page 100 the court said concerning the plaintiff:

> "She was, no doubt, entitled to recover all the damages which she suffered; but damages accomplishing the same result to a person in perfect health would certainly be greater than to a diseased person. In this case, the plaintiffs were standing upon the allegation of perfect health and in all fairness should abide the result upon the issue as made by them."

In March 1939 Mrs. Stanger gave birth to her third child and was attended by Dr. Miller, her family physician (R. 147). On November 10, 1939, Mrs. Stanger consulted Dr. Hoyt B. Woolley for excessive flowing (R. 219). Dr. Woolley testified from his record made by him at the time that when Mrs. Stanger consulted him she told him that for the past four years she had been flowing eight to ten days twice a month, and had three children R. aged 9, 6 and 2 (R. 148), further reading from his notes made at the time of Mrs. Stangers visits to his office, he testified that she said that this was accompanied by large clots, backache, cramps in the groin before menses and during menses, fatigues easily, run down most of the time and had been taking iron preparation, that

the last menstrual period was October 28th to November 9th and that the last five days was much darker than usual (R. 219). The blood count at that time showed 42% hemoglobin. The pathological report fits in with the history that Mrs. Stanger gave to Dr. Woolley (R. 224). He gave her a prescription for an elixir to be taken three times a day and also gave her shots or hypodermic injections of astrone and the last time he saw her was December 14, 1939 (R. 220). He did not give her a physical examination because she was planning to go on a trip but had an understanding with her that she was to return to him after she had made the trip (R. 220). She never returned to him, and Dr. Woolley states that she was not cured and nobody disputes him. Upon cross-examination he admitted that of course she would not menstruate while pregnant. Mrs. Stanger's counsel could of course have inspected Dr. Woolley's record, which he stated he had in court, if they had so desired.

Mrs. Stanger took the witness stand in rebuttal to Dr. Woolley and testified that she did not tell him that she had menstrual periods of the duration which he had testified but asserted she told him that instead of occupying four days they were prolonged to seven days (R. 300). She did not dispute Dr. Woolley's statement that she was to return for future treatment, nor did she deny that she had told him that her periods of flowing had been attended by large clots, backache, cramps in the groin before menses and during menses, run down, easily fatigued, and that the last five days of discharge of her last menstrual period was much darker than usual (R. 219). We must assume under the circumstances that Dr.

Woolley's testimony in these particulars was correct. Considering that it coincides with her hospital record, it is conclusive.

Dr. Woolley further testified that he had built up her hemoglobin count to 62 before she left on her trip but that the treatment that he was giving her would not effect a permanent cure and that the effects of it would wear off in time, that an operation would be necessary to cure a condition of fibrosis uteri with diffuse endometrial hyperplasis (R. 224) (Muscular or abnormal increase of the lining of the uterus (R.99,226), and that to ultimately effect a stopping of the excessive flowing it would be necessary to remove the uterus (R. 238, 244). This part of Dr. Woolley's testimony was not disputed, but was either circumstantially or expressly corroborated by her own physician and witness, Dr. Hatch (R. 96, 99, 100) and concurred in by Dr. Brothers (R. 251).

Dr. Brothers testified for the defendant that he had examined Mrs. Stanger at Idaho Falls on October 9, 1941, and that she had told him that she had experienced excessive menstruation following the birth of her last baby and never was free from some bloody discharge except four or five days at a time (R. 248); had been given hypodermic injections with some improvement and was feeling some better when she went on the trip. Mrs. Stanger, when called in rebuttal, merely asserted that she did not state to Dr. Brothers at the time he examined her at the hospital on October 9th, 1941, that she had been flowing excessively since the birth of her last child or at any other time. Since that was the subject matter of her suit, and the occasion for his examining her what could be

more natural than that they should have mentioned the matter? Again what Dr. Brothers testified Mrs. Stanger told him is in its most important particulars corroborated by her hospital record. She does not deny the substance or form of their conversation, but denies that the thing relative to which he was examining her was mentioned at all (R. 300). Dr. Brothers further testified that he had read the pathological report and from that and his examination he was of the opinion that she had been suffering from fibrosis of the uterus, chronic cervicitis, inflamation of the cervix and hyperplasia of the endometrium. The symptoms of fibrosis uterus recorded in the pathological report (R. 249) are excessive menstruation, followed by anemia (low blood count), all the symptoms of anemia, such as nervousness and weakness (R. 249) He further testified that while she might have been given x-ray or radium treatment that the character of treatment that Dr. Hatch performed, an operation, would ultimately be necessary (R. 251). Dr. Brothers was asked, "assuming the history that Mrs. Stanger gave you about excessive menstruation following the birth of her last baby, approximately two years ago, what is your opinion as to what that condition was, or what it was leading up to. Did that have any connection with the fibrosis uteri?" His answer was "Yes, I think it did" (R. 251), and in this even her own physician did not dispute him. He further stated that excessive flowing is not caused by physical violence or injury unless there is a direct injury to the organ, even in a uterus not normal (R. 257), and in that he was not disputed either by Dr. Hatch or anyone else; that all of the symptoms which Mrs. Stanger displayed following

the derailment, consisting of a nervous condition and excessive flowing, would be only temporary and should clear up with a few day's rest (R. 258). Neither Dr. Hatch nor anyone else disputed this opinion of Dr. Brothers. What she actually did is established by her own testimony hereinbefore recited, to the effect that on the day of the derailment she enjoyed two dinners, with the horse show sandwiched between the noon meal and the evening meal at the Denver Athletic Club, and thereafter boarded the train for Houston, Texas, from whence she went to Mexico City, where she viewed the sights for three or four days, and then returned home by way of Los Angeles (R. 146). Can anyone be so credulous as to believe that with this performance she was either suffering serious nervous shock or serious physical handicap or disorder?

The testimony showed that the table against which Mrs. Stanger asserts she was thrown was 10¼ inches above the cushion upon which she was sitting and that the cushion had some give in it (R. 268). The court signed findings prepared by plaintiffs' counsel to the effect that Mrs. Stanger had been thrown violently against the table, striking the lower portion of her abdomen, but the words "lower portion of" were stricken, upon appellant's objection (R. 43). Dr. Hatch, testifying for the plaintiff, stated that the uterus, the ovaries and the cervix are situated in the lower part of the body behind the pelvic and pubic bones (R.101), which corroborates Dr. Brothers' testimony to the effect that excessive flowing is not caused by violence unless there is a direct injury to the organ (the uterus) and that could not happen under the facts of the case, with the organs in question thus situated and protected

and the table so far above them. The record absolutely will not support such a finding. One can readily conclusively demonstrate with a ruler that a point 10¼ inches above the seat or cushion is considerably above the navel and very near to the solar plexis of a man and probably would reach the solar plexis and ribs of a small person such as this woman, especially if the person was in a forward position, such as would be the case if the vehicle were suddenly stopped.

Under these circumstances the hospital record which was introduced in evidence becomes important, for that bears an entry to the effect that since the birth of her last child she had been flowing instead of four days always three weeks, quite heavy flow last two months, weakness but up and around, very nervous, takes liver shots since September 1939. This record was not made or influenced by any adverse person, and must be the resolving factor of the conflict between the testimony of Dr. Woolley and Dr. Brothers on the one hand and of Mrs. Stanger on the other hand. This much of her hospital record is definitely certain, and so far as history is concerned, must rest upon her own indisputable statements and the simultaneous entries made either by or at the direction of her own physicians.

Dr. Hatch spoke of this fibrosis uterus as a bleeding uterus and stated that he performed the operation to stop the bleeding and accomplished his purpose (R. 96, 99, 100, 103). He had testified that the physical findings before the operation did not disclose enough definite abnormality to justify the operation if it had not been for the otherwise incorrectible bleeding"

(R. 116), but obviously he must have so concluded or he would not have performed the operation which he did with the purpose in mind which he had and which diagnosis was subsequently fully confirmed by the pathological report. But regardless of what his motive may have been the removal of the fibrosis uterus did stop the flowing and the pathological report of Dr. Daines of Salt Lake City corresponded with Dr. Hatch's pre-diagnosis by reporting "fibrosis uteri with diffuse endometrical hyperplasia and chronic cervicitis follicular cyst of ovary with corpus hemorrhagicum" (R. 109-111). There is no room for any other conclusion under the evidence than that this condition was one which resulted from child birth and was well established before Mrs. Stanger took the trip and that this preestablished condition for which she had been seeking relief was the *cause* of the operation being performed.

These undisputed facts were utterly ignored by the Court in the making of his finding (R. 22) and rendering judgment (R. 28), by which process the court jumped the gap, and without proof to support him, charged the defendant, not with temporary nervousness and inconvenience, which is all the record will support, but with the consequences of a condition which the physicians unanimously agreed existed before the derailment and required the operation to correct.

At no time did Dr. Hatch or anyone else testify that either the physical or nervous shock, or both, or any injury sustained by Mrs. Stanger in the derailment *caused* the fibrosis uterus or was the *cause of the operation*, or that there would not have been need for an operation if she had not been in the derailment.

If we lay aside all evidence except the undisputed medical testimony of what was found and what was done to correct it the chain of cause and effect which the record compels is this: the uterus is situated within the pelvic and pubic cavity (Hatch R. 101),

> "The pelvis is the baselike cavity of the lower portion of the trunk containing the urinary and genetal organs —the genetal organs embrace the uterus and ovaries. The pubic bones are at the lower part of the pelvic cavity." (any modern dictionary);

Dr. Hatch operated on her for excessive flowing and continued flowing which was the *cause* of her condition (R. 103, 95) and which operation cured it (R. 97); Dr. Woolley treated her for the same thing subsequent to the birth of her child and *before* her trip; chronic fibrous cervicitis "is scarred tissue formation in the neck of the womb that is very frequently due to chronic infection following childbirth and so forth" (Hatch, R. 101) and infection and scar tissue following childbirth could cause fibrosis uterus if there is severe infection (R. 101-102), and Dr. Hatch had a history of her "having this bleeding" "following the birth of the child" (R. 104); that he operated to stop the bleeding and that it was necessary to do that (R. 96); that she told him she had been to other doctors for treatment for this same condition, "that is for bleeding that was prolonged after childbirth" (R. 105); she had "bleeding uterus, nervous, emotionally upset. *The thing that concerned me was the bleeding uterus*" (R. 104). When he operated the excessive flowing ceased, hence the sequence of cause and effect is (1) childbirth infection, (2) fibrosis

uterus and chronic cervicitis, (3) bleeding, (4) thinning of the blood, (5) nervousness; remedy (a) remove the fibrous uterus (b) caused by childbirth infection (c) the bleeding stops (d) the blood count builds up (e) the nervousness ceases (R. 249-250). Conclusion: Mrs. Stanger, regardless of what her testimony may have been, contracted an infection and scarring of the uterus following childbirth, creating a condition of fibrosis uterus, as a result of which the uterus did not contract and shut off the flow (Hatch 99, Woolley 226) for the ultimate and permanent cure of which an operation was necessary (R. 224, 96-99-100, 251).

1. She was not struck in lower abdomen, there being no evidence to suport such a finding (R. 19, 29, 43).

2. The operation was not caused by the derailment, and the record does not support such a finding;

3. The derailment was not the cause of the nervousness but the nervousness was a result well recognized by the medical profession of fibrosis uterus and chronic cervicitis, resulting in bleeding and consequent nervousness, the well developed symptoms of which she had displayed at least since March, 1939;

4. The sterility of Mrs. Stanger was not the result of the derailment (R. 22) and was not caused thereby, and the record does not support such a finding;

5. The most serious consequences to Mrs. Stanger of the

derailment, if she had used ordinary prudence, would have been but of a few days duration; but with or without ordinary prudence the operation was caused by a chronic bleeding uterus, and not the derailment;

6. That the mishap probably was not of serious, if any consequence, to Mrs. Stanger, for such a conclusion is not reconcilable with what she did immediately thereafter and during the two weeks immediately following, nor the undisputed medical testimony;

7. That upon the face of the record the court in making his award has made no segregation between the condition of the plaintiff existing before the derailment, for the correction of which the operation was performed, and the limited consequences lawfully assignable to the derailment, but that the major portion of the award is in compensation for a chronic condition, and the cure thereof, with which the defendant is not chargeable or liable in law.

We submit, first, that it stands undisputed upon the record that the derailment was caused by a fresh break of a wheel, from internal stress, which could not be discovered except by sawing or cutting the wheel, and the appellant was entitled to judgment as a matter of law, and, secondly, it is established beyond dispute that Mrs. Stanger was suffering from a well developed physical disorder, which was the

occasion and cause of the operation performed upon her, and the lower court erred in charging the defendant therewith.

Respectfully submitted,

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